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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 209

EMICH MOTORS CORPORATION and
U. S. ACCEPTANCE CORPORATION,
Petitioners,

vs.

GENERAL MOTORS CORPORATION and
GENERAL MOTORS ACCEPTANCE CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS.

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REPLY BRIEF FOR PETITIONERS.

I.

The Court of Appeals Has Virtually Made It Impossible For Private Litigants To Obtain Any Benefits From Prior Government Anti-Trust Actions In Contravention Of The Public Policy Underlying Section 5 Of The Clayton Act.

Respondents contend that the Court below has *extended* rather than nullified that public policy underlying Sec. 5 of the Clayton Act in holding that Petitioners could have no more from the judgment of conviction than an instruction from the trial court that the judg-

ment was *prima facie* evidence that Respondents engaged in a "conspiracy to restrain dealers' interstate trade and commerce in General Motors cars for the purpose of monopolizing the financing essential to the movement of those cars" (R. 9454) (Resp. Bf., p. 11).

If such is the case, public policy has been so far "extended" as to give the victims of anti-trust law violators the barest minimum of possible benefits. Any further "extension" of this type and the victim will be completely out of court.

As has been seen, public policy is to put the oppressed on equal footing in a court of law with his oppressors so as to enable him to recover damages for the injuries inflicted upon him. To secure this equality, the victim must have more than an ineffectual instruction since his opponent has the right and means to not only relitigate its entire defense in the prior suit but to offer additional evidence.[1] Thus, if the victim is to have any equality, he must have the benefit of the Government's evidence in the prior suit since he has neither the money nor the ability to reproduce that evidence.

The holding of the Court below not only deprives Petitioners of this evidence, but also of the benefit of matters of law established in the criminal suit. (See p. 21 post.)

If that holding is approved by this Court, Petitioners will be given only the 26-word instruction before set out with which to overcome a tremendous mass of testimony adduced through Respondents' horde of witnesses in the

[1] Respondents have failed to reply to our argument (Pet'r. Bf., p. 20) that there is no true estoppel under Section 5 since Respondents are permitted to deny the truth of matters estopped by the judgment.

presence of the jury. To employ a euphemism, Petitioners have already had a taste of this through the more than one hundred witnesses Respondents produced at the trial below on the conspiracy phase alone. Such equality is unmatched since the battle at the Alamo.

We submit that if a jury in a treble damage action based on a complex, nationwide conspiracy such as here, is given no other information of the conspiracy than through such a bodyless instruction, it cannot acquire even a hazy knowledge of what defendants were convicted. And the victim can have little or no hope of convincing the jury of the existence of the conspiracy except by reproducing the Government's evidence, which is precisely what Section 5 was designed to eliminate.

The holding of the Court below, unless reversed by this Court, will acquire such precedent value that those injured by large scale conspiracies will have no effective remedy under Section 5. The bringing of treble damage suits will thus be discouraged, and public policy is further violated since such suits are regarded as an effective means of enforcing the anti-trust laws. (See Pet'r. Bf., p. 12).

Respondents assert that the judgment of conviction was "not admissible for any purpose" and concede that their position "might seem to nullify Section 5 of the Clayton Act" (Resp. Bf., p. 23). The Court below went but one short step beyond Respondents' position, virtually nullifying Section 5.

Respondents seek to avoid their concession by asserting that such a result is created only by the peculiar form of the GM criminal indictment (Resp. Bf., p. 23). This peculiarity, according to them, is found in the fact that what they refer to as the charging clause, is couched

in the words of Section 1 of the Sherman Act (Tit. 15, Sec. 1, U.S.C.A.), and that the terms of the conspiracy are set forth in 26 succeeding paragraphs. They claim that in 110 indictments that they have examined "the accusatory section was not in the language of the statute but alleged a specific type of restraint and the further allegations of terms were merely a particularization of the specific offense" (pp. 24-25).

Respondents, of course, overlook the fact that paragraphs 34 and 35 of the indictment, when read together, set out the conspiracy and its terms not in the words of the Statute (R. 21). Thereafter there follow 26 paragraphs describing the means and methods by which the conspiracy was to be carried out (R. 21-25). All of these paragraphs should be read together in determining the conspiracy charged. *U. S.* v. *Armour & Co.*, (C. A. 10) 137 F. (2d) 269, 270, and cases cited therein. It is thus nonsense to assert a distinction on the basis of the position of the allegations in which terms and means are set forth. (See fn., p. 20, post.) Even the Court below was able to ascertain that the terms of the conspiracy were set forth in paragraphs 34 and 35 since it described the conspiracy charged in those terms, 121 F. (2d) 376, 383 (R. 9454).

In the light of the above discussion, Respondents' argument as to why Section 5 is not nullified is without merit.

Further, Respondents' assertion that the form of the GM criminal indictment is unique is just not true. It is identical in form with many past and pending anti-trust indictments (Pet'r. Bf., fn. p. 17).

Hence, since the indictment is not unique but of a type commonly used by the Government, the holding of the Court below will deprive victims of many other conspira-

cies of the benefits of Section 5. That Court has thus nullified, and not extended, public policy.

It becomes obvious that there is no distinction between the public policy supporting Section 5 and a broad application of the principles of *res judicata*. since under both the private litigant would be given the benefit of the Government's evidence. Respondents' contention that the Government in a subsequent suit between them, based on the same wrong, could use the judgment only to support some proposition which had been determined in the criminal case (Resp. Bf., p. 13) is in error and directly contradictory to *Commissioner* v. *Sunnen,* 333 U. S. 591, 597, and *Cromwell* v. *Sac,* 94 U. S. 351, 352. Under the rule of these cases the Government could rely on all matters offered and received to support the action in the criminal case. We point out that Petitioners are placed in the Government's position under Section 5.

II.

The Criminal Judgment Was Evidence Of The Cancellation Of Emich Motors' Franchises.

A. Section 5 of the Clayton Act does not adopt the narrow principles of collateral estoppel.

Respondents do not dispute our argument that if broad principles of *res judicata* are to be applied to determine what matters were established by the criminal judgment, then under the doctrine of *Cromwell* v. *Sac,* 94 U. S. 351, 352, and *Commissioner* v. *Sunnen,* 333 U. S. 591, 597, the judgment was evidence of every matter offered and received to sustain the Government's case (Pet'n. Bf., pp. 21-27). Such matters included the fact that Emich Motors' franchises were cancelled pursuant to the conspiracy (Pet'n. Bf., pp. 6-8, 24-27).

They urge, however, that Section 5 incorporates the narrow doctrine of collateral estoppel for the following reasons (Resp. Bf., pp. 14-15):

1—The statute uses the words "judgment" and "estoppel", and therefore this means estoppel by judgment.

2—The customary method by which estoppel by judgment is put to use is as "evidence" whereas *res judicata* comes into operation through pleading.

3—Congress so intended.

We answer these arguments in that order:

1. We have previously argued that Respondents took undue advantage of the propinquity of the words "judgment" and "estoppel" in Sec. 5, so as to give them the connotation of estoppel by judgment (Pet'n Bf., p. 19).

Apart from that argument, we desire to point out that there is no certain, narrow meaning to be given the use of the words in proximity to each other. Even when combined into the phrase "estoppel by judgment", a broad or a narrow estoppel may arise. This Court has so stated in *Tait* v. *W. Md. R. Co.*, 289 U. S. 620, where it said (p. 623):

> "The scope of the *estoppel of a judgment* depends upon whether the question arises in a subsequent action between the same parties upon the same claim or demand or upon a different claim or demand. In the former case a judgment upon the merits is an absolute bar to the subsequent action. In the latter the inquiry is whether the point or question to be determined in the later action is the same as that litigated and determined in the original action." (Emphasis supplied).

In *Troxell* v. *Delaware L. & W. R. Co.*, 227 U. S. 434, the Court stated (p. 440):

> "Where the second suit is upon the same cause of action set up in the first suit, an *estoppel by judgment* arises in respect to every matter offered or received in evidence, or which might have been offered, to sustain or defeat the claim in controversy; but, where the second suit is upon a different claim or demand, the prior *judgment* operates as an *estoppel* only as to matters in issue or points controverted and actually determined in the original suit." (Emphasis supplied).

Respondents cite a particular oral argument by Petitioners to the trial Court (Resp. Bf., pp. 6, 15) apparently as a concession somehow precluding Petitioners from contending here that the broad form of estoppel is applicable under Section 5. The cases cited, *supra*, make clear that no such meaning can be read into such a comment.[1] *Arguendo*, even if it were a concession, it would not prevent another theory from being advanced in support of the judgment. *Helvering* v. *Gowran*, 302 U. S. 238, 245-246.

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[1] The cited remarks were expressly confined (R. 425) to the admissibility of "the entire evidence of the criminal case" (R. 422, 423) as evidence extrinsic to the common law record of "what was established" by the conviction and as proof in the instant case of those matters there established (R. 442, 443).

Counsel made the same argument as in the Petition, contending that Section 5 referred to rules "applicable to the principles of estoppel by judgment" only by way of analogy, but not that "estoppel by judgment is a rule applicable here. It is only secondarily applicable" (R. 424); further, that to apply the qualifications of that doctrine to cases under Section 5 would be "an irrational use of that principle" (R. 441).

Counsel further argued that while the court "has the responsibility * * * in the first instance" of determining the scope of the estoppel as a matter of law, "that simply begs the question" (R. 426) which was how the jury could be apprised "sufficiently of the facts, the factual issues * * * decided in the criminal case"—"so that they could exercise that function (of determining such issues) intelligently and with knowledge" (R. 427).

2. Under both the broad and narrow form of estoppel, the judgment is used as evidence. Thus, in recognizing that there are two rules of law on the subject of estoppel by judgment, Black has stated that there is a "sharp distinction between the principles governing the two typical cases, (*i.e., res judicata* and collateral estoppel) in which a judgment may be offered *as evidence*". Black, The Law of Judgments, 2 Ed., Vol. 2, Par. 506, p. 767.

Further, it is said that:

> "A judgment rendered by a court having jurisdiction of the parties and subject matter, whether correct or not, is conclusive and indisputable *evidence* as to all rights, questions, or facts put in issue in the suit and actually adjudicated therein, when the same come again into controversy between the same parties or their privies in proceedings upon the same or a different cause of action." 34 *C. J.*, 902.
>
> "Where issue has been properly taken upon a plea of *res judicata* or former recovery, the plea may and should be supported by the introduction in evidence of the record of the former judgment." 34 *C. J.*, 1065.

3. Congress intended, as heretofore argued (Pet'r. Bf., pp. 13-14) to give private litigants the benefit of the Government's evidence in the prior suit. The best expression of this is found in Senator Reed's remarks during the debate on Section 5 to the effect that the private litigant should be permitted "to lay down in court the transcript of the evidence" in the Government's case, 51 Cong. Rec. 15822. See also remarks of Senator Chilton, 51 Cong. Rec. 13856, 16003; and Senator Bryan, 51 Cong. Rec. 13897.

B. Under narrow principles of estoppel, a judgment establishes all matters litigated and determined. There is no requirement that those matters be necessary to the entry of the judgment.

Respondents contend that narrow estoppel applies "only to matters necessarily decided and not to those that may have been decided", citing *Russell* v. *Place*, 94 U. S. 606, 608; *DeSollar* v. *Hanscome*, 158 U. S. 216, and *Packet Co.* v. *Sickles*, 72 U. S. 580. (Resp. Bf., pp. 17, 33). The true rule is, however, that narrow estoppel applies to all matters litigated and determined in the prior judgment. *Commissioner* v. *Sunnen*, 333 U. S. 591, 598; *Cromwell* v. *Sac*, 94 U. S. 351, 352. The cases cited by Respondents stand only for the proposition that where the record of the prior trial does not show what issues were litigated and determined, the judgment shall be deemed to adjudicate only that which is necessary to its entry. Those cases therefore extend rather than limit the principles of estoppel by judgment. The real significance of these cases is lost upon Respondents, since each case invites extrinsic evidence to prove that the jury found something more than was necessary to the judgment. Thus what is estoppel may be something more than that which is indispensable, in the sense of necessary, to the judgment. That "something more" is obviously that which, being material, was actually litigated and determined, otherwise there would be no reason to pursue the inquiry outside of the common law record.

The trouble with Respondents' use of the cases cited by them is that they stop there and make only a superficial attempt to examine the sources from which it may be ascertained what was litigated and determined. We have pointed out (Pet'r. Bf., p. 30), that the pleadings, the record of evidence, the instructions in the criminal

case, as well as the opinion of the Court below on the appeal of that case are the sources in this respect. In our brief we examined those sources, and from them, individually and collectively, we demonstrated that the criminal judgment did establish with certainty that Emich Motors' franchises had been cancelled pursuant to the conspiracy. (Pet'r. Bf., pp. 27-37).

(a) The Court of Appeals on the criminal appeal made no independent findings of fact. Its opinion merely recites the facts found by the jury.

Respondents criticize our use of the opinion of the Court below in the criminal appeal. They say that the Court below did not purport to find that the jury had found any of the facts recited by it (Resp. Bf., p. 16). Then through some strange process of reasoning, this is translated into a statement that it was beyond the power of the Court below to find facts (Resp. Bf., p. 16).

It has never been contended by Petitioners that the Court below found any facts in the criminal case. What the Court did was to determine what facts had been found, not by it, but by the jury. Hence, all of Respondents' citations (Resp. Bf., p. 18) are not in point. It is elementary that the right to ascertain jury determinations is within the basic review powers of the court below.

As above stated, the Court below did determine what had been decided in the criminal trial and referred to such determinations in such terms as "the jury's findings" (121 F. (2d) 397, 398) and "the jury resolved the disputed questions of fact" against Respondents (121 F. (2d) 402).

An examination of the opinion (Pet'r. Bf., pp. 30-33) indicates clearly that the cancellation of Emich Motors' franchises was one of the coercions found by the jury as having been imposed pursuant to the conspiracy.

(b) The cancellation of Emich Motors' franchises pursuant to the conspiracy was litigated and determined in the criminal case.

Respondents argue that since Emich's testimony in the criminal trial that his franchises had been cancelled was not necessary to the judgment, therefore such cancellations were not determined by it. We have already demonstrated (pp. 9-10, ante) that what is established by a judgment is not what was necessary to its entry but is what was litigated and determined. We have also shown that these cancellations were litigated (Pet'rs. Bf., pp. 6-8, 33-35). That they were determined is evident not only from the discussion in our brief (Pet'rs. Bf., pp. 27-37) but also from the argument that follows at pp. 15-18, post.

Respondents' contention that Emich was not believed because all those that he sought to implicate were acquitted is facetious. Respondents have refrained from informing this Court that all the individual defendants in the criminal case were freed by the jury. Hence the *reductio ad absurdem* that since the jury acquitted all individuals, it believed none of the Government witnesses but nevertheless convicted Respondents. The acquittal of the individuals caused the Court below on the criminal appeal to observe "We cannot understand how the jury could have acquitted all the individual defendants" and that the verdict acquitting them appeared to be either "jury mistake or jury leniency". (121 F. (2d) 411).

How different was the approach of the Court below in the instant case when it seized upon the acquittal of the individual defendants in order to justify its holding that the criminal judgment did not establish the means and acts charged in the indictment (R. 9453).

(c) and (d) The least that the jury in the criminal case found was that Respondents had conspired to restrain dealers' interstate commerce in GM cars for the purpose of monopolizing the financing essential to the movement of those cars by cancelling dealers, including Emich Motors, refusing to renew their franchises and by discriminations in the delivery of cars. The jury's general verdict established these and other coercions alleged in the indictment.

Despite their conviction, which was affirmed on appeal with *certiorari* denied, Respondents with a stubbornness that commands amazement, still insist that the criminal judgment established nothing and was hence inadmissible against them for any purpose (Resp. Bf., p. 23).

They argue that since the indictment charged a conspiracy to do 26 different things, and since the trial Court instructed that it was unnecessary for the Government to prove all of the terms of the conspiracy (Resp. Bf., pp. 20-21), it is impossible to tell from the general verdict of the jury what Respondents conspired to do (Resp. Bf., p. 23). They argue further that under such an instruction they could have been found guilty "even though all terms of the conspiracy except one remained unproven" (Resp. Bf., p. 21). Therefore, they say that although they may have been found guilty of a conspiracy to withhold cars or cancel franchises or to grant franchises only on condition that GMAC be used, it is nevertheless impossible to tell of what term or terms of the conspiracy they have been convicted (Resp. Bf., p. 23). Unfortunately, there seems to be some plausibility to this argument to the unthinking and the Court below accepted it.

The fault with such an argument lies in the fact that it makes no effort to investigate what the jury actually did determine. As stated, *supra*, pp. 9-10, the law has provided means by which it is possible to ascertain

which, if not all, of the matters litigated were determined in favor of the Government. The Court below erred in refusing to examine all these sources, but gave an overriding effect (R. 9456) to one isolated portion of the trial court's instructions to the effect that it was not "necessary for the Government to prove all of the acts alleged" in order to convict (R. 8536). This instruction is a stock form of instruction and was given in *Local 167* v. *U. S.*, 291 U. S. 293 (Pet'rs. Bf., fn. p. 18). Yet it was there held that the judgment established all of the means and acts alleged in that indictment. (See discussion *re* comparability of the indictments in the *Local 167* case and in the case at bar, pp. 18-19 post.)

Respondents' entire argument is anchored on such instruction. They have failed, however, to advise this Court that the trial Court in the criminal case also charged that the commission of acts of coercion pursuant to the conspiracy was the main fact question for the jury. This is made clear from its instructions on this point. It instructed as follows:

> "As I said to you yesterday, *the ultimate question* for you to decide is this: Did the defendants conspire to restrain unreasonably or restrict unreasonably interstate commerce in General Motors cars? *That is the ultimate question, but involved in that are the questions of fact as to whether the means that are set up in the indictment, the acts constituting the means by which the alleged conspiracy was effectuated, have been proved.*" (R. 8547). (Emphasis supplied).
>
> "But the charge in this indictment is that they utilized a contract which was limited to one year and might or might not be renewed and a cancellation clause in that contract upon short notice and discrimination in the shipment or non-shipment of auto-

mobiles,—used them as a club upon their dealers, and thereby coerced them to use something which they, as free agents, would not have used.

"That is the groundwork upon which this charge is brought, and *whether they did or not is a question of fact which you alone can decide.*" (R. 8548). (Emphasis supplied).

"*The ultimate question, after all, is whether, under all the facts and circumstances the acts of coercion mentioned in the indictment and set up in the indictment have been proved beyond all reasonable doubt,* and, second, if they have been so proved, whether they, as a result, *effectuated an unreasonable restraint* on the interstate commerce in General Motors automobiles. If they effectuated a restraint, then you have got to determine, from all the facts and circumstances, whether it was an unreasonable restraint." (R. 8549). (Emphasis supplied).

Despite the clarity of these instructions, Respondents contend that it was not necessary to prove the commission of acts save for venue purposes (Resp. Bf., p. 21), an error into which the Court below also fell (R. 9453, 9455) despite its prior opinion to the contrary in the criminal appeal (121 F. (2d) 385).

As previously pointed out (Pet'rs. Bf., pp. 29, 30), this Court in *Ford Motor Co.* v. *U. S.*, 335 U. S. 303, 316-317, has determined that the acts of coercion which the jury in the criminal case had to find in order to convict were cancellations of dealers' contracts, refusals to renew same, and discriminations in the shipment of cars. Respondents have conceded that the judgment is relevant to Petitioners' case if it established those coercions (Resp. Bf., p. 22. This Court's view that those coercions were established in the criminal trial destroys their argument once and for all.

From the above analysis, it is quite evident that the very least that the jury in the criminal case found was that Respondents were guilty of a conspiracy to restrain dealers' interstate commerce in GM cars for the purpose of monopolizing the financing essential to the movement of those cars and that the conspiracy was effectuated by cancellations of dealers' franchises and refusals to renew same, and by discrimination in the delivery of cars.

A judgment based on such a finding is relevant evidence of the cancellation of Emich Motors' franchises pursuant to the conspiracy for the following reason: Evidence of that conspiracy apart from any judgment would be admissible to establish intent under the rule of the *Lisenba* case and other cases cited *infra*. Section 5 makes the judgment admissible to prove at least that conspiracy. Since, by definition, a conspiracy means an illegal agreement, the judgment is proof of an illegal frame of mind to do acts germane to the conspiracy. As seen above, cancellation of dealers is such an act.

There was no dispute that Emich Motors' franchises were cancelled. The sole issue was whether they occurred with the frame of mind to carry out the conspiracy (R. 9459). Therefore the judgment was admissible as evidence that the cancellations of Emich Motors' franchises were effected with the conspiratorial frame of mind. *Lisenba* v. *California*, 314 U. S. 219, 227-228; *Williamson* v. *U. S.*, 207 U. S. 425, 450-451; *Devoe* v. *U. S.*, (C.A. 8) 103 F. (2d) 584, 588-589; *Huff* v. *U. S.*, (C.A. 5) 228 F. 892, 893.

The judgment in the criminal case established the cancellation of Emich Motors' franchises for an additional reason. As has been seen, the Government, in order to sustain the issue that the coercions above set forth were in fact imposed upon dealers, offered the testimony of Emich and a number of other ex-dealers and then dealers

(Pet'r. Bf., pp. 6-9, 33-35). Respondents controverted this testimony (Resp. Bf., p. 20). They contend that because of this a number of issues arose. Conceding, for the purposes of the argument, that this be true, nevertheless, under the rule of *Rhoads* v. *City of Metropolis,* 144 Ill. 580, the judgment established *prima facie* that all such issues had been determined in favor of the Government by the jury's general verdict.

In that case the City asserted that a judgment in its favor in a prior suit instituted by Rhoads constituted an estoppel as to a certain issue. In the prior suit, the City had introduced evidence on two defenses and the jury returned a general verdict in favor of it. In the second action, Rhoads maintained that the judgment did not constitute an estoppel because it could not be determined on which of said defenses the jury had based its verdict. The Court (p. 586) held that

> "*where evidence upon all issues is heard,* a general verdict in favor of the defendant is *at least prima facie* evidence, that all the issues presented by the pleadings were found in his favor". (Emphasis partly supplied).

See also *White* v. *Simonds,* 33 Vt. 178, 180, 181.

Respondents quite angrily complain that they have called our attention to the fact that the *Rhoads* case had been overruled in Illinois, but that we continue to cite it. (Resp. Bf., p. 18). The fact is that the *Rhoads* case has not been overruled but its doctrine has been extended.[1]

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[1] In **Lake v. Tomes (1950) 405 Ill. 295,** the Supreme Court held that even where the causes of action were not the same, an issue which might have been raised in the first case but was not, was determined by the judgment in that case.

Respondents point to *People* v. *C. & E.I.Ry.Co.*, 336 Ill. 506, and *People* v. *Wyanet Light Co.*, 306 Ill. 377, as authority for their statement. Neither of these cases mentions or cites the *Rhoads* case. Further, they are easily distinguished. In each of these cases, the Court in the second action did not have before it the testimony in the first action, so that it could not determine whether evidence was offered to support the multiple issues. The basis for the rule in the *Rhoads* case was that the Court did have the testimony in the prior case indicating that evidence was offered on all the issues. Therefore Respondents' cases are not inconsistent with it.

A further reason that the judgment established the cancellation of Emich Motors' franchises pursuant to the conspiracy is found in the doctrine heretofore discussed by us that a general verdict of guilty by a jury establishes all the averments of the indictment. *Chesavoir* v. *U.S.*, (App. D.C.) 32 F. (2d) 945, 947; *Statler* v. *U.S.*, 157 U.S. 277, 279. (Pet'r. Bf., pp. 35-37).

Respondents seek to distinguish the *Chesavoir* case and completely ignore the authority of Bishop's New Criminal Procedure, Vol. 1, p. 870, discussed in our brief at p. 36. They claim that the proper rule is that "a general verdict is equivalent to a finding of every essential ingredient of the crime charged (Resp. Bf., p. 17). They then contend that this is all that the *Chesavoir* case stands for. In so contending, Respondents are hoist by their own petard for the cancellation of dealers, including Emich, pursuant to the conspiracy, was an essential ingredient of the crime charged. Respondents themselves maintain that the indictment in the criminal case charged a conspiracy, LEGAL in purpose, but which was carried out through illegal means. (Resp. Bf., Fn. p. 24) The illegal means were thus essential ingredients of the crime charged. *Pettibone* v. *U.S.*, 148 U.S. 197, 203.

Therefore, Respondents' argument carried to its logical conclusion stands for the proposition that all allegations of illegal means charged in the indictment, including cancellations of dealers, were found by the jury's verdict against Respondents.

We also argued (Pet'r. Bf., p. 37) that if the jury meant to convict Respondents of less than all the means and acts charged it could have returned a special verdict, finding specifically of what Respondents were guilty and not guilty. Respondents reply that no form of special verdict was submitted to the jury (Pet'r. Bf., p. 18). This is not a sound argument since it was incumbent upon them to request a special verdict if they wished to avoid the effect of a general verdict. *White* v. *Simonds*, 33 Vt. 178, 181.

(e) There are no essential differences between Local 167 v. U.S., 291 U. S. 293 and the case at bar and therefore the rule in that case applies.

Respondents represent that there are basic differences between the indictment in *Local 167* v. *U.S.*, 291 U.S. 293, and the indictment in the *GM* criminal case. They assert that the former "alleged in the terms of a factual conspiracy an agreement intended to * * * prevent, hinder and restrain certain persons from "purchasing, selling and shipping live and freshly slaughtered poultry" and that after the detailed statement of the terms of the conspiracy there were alleged twenty different "'means and methods'" (Resp. Bf., p. 24).

By so describing that indictment, Respondents seek to mislead this Court into believing that all of the terms of the conspiracy were alleged in one paragraph. In fact, they have so stated to this Court (Resp. Bf. in opp. to Pet'r. Pet. for Cert., p. 17, fn. 1). Since this was exposed

by us (Pet'rs. Reply Bf. to brief of Resp. in opp. to Pet. for Cert., p. 11, fn. 1) they have adopted the ambiguous description, *supra*. The fact of the matter is that terms of the conspiracy charged in the *Local 167* case appear in 7 separately numbered paragraphs, 16 to 22. The objects were numerous and are found in the first 6 of those paragraphs, as specifically alleged in paragraph 22, *viz.*: "in order to carry out the objects set forth in paragraph 16 to 21, inclusive". The means and methods were numerous and were set forth in 20 lettered sub-paragraphs of paragraph 22.

Thus, there is no valid distinction between that indictment and the GM criminal indictment, since in the latter the conspiracy and its purpose are alleged in 2 paragraphs (R. 21; par. 34, 35) and the means and methods in 26 following paragraphs (R. 21-25; Pars. 36-62).

Further, Respondents' contention is frivolous because, as we have already demonstrated (p. 4, *ante*), all paragraphs of an indictment are to be read together.

Respondents argue that there was no necessity in the *Local 167* criminal case (*Greater New York Live Poultry C. of C.* v. *U.S.*, (C.A. 2) 47 F. (2d) 156) for the Government to prove any means and methods by which the conspiracy was carried out, and therefore the trial Court's instruction to the effect that not all means and methods needed to be proved was proper (Resp. Bf., p. 25).

An examination of this instruction (Resp. Bf., p. 25) indicates that the Court there charged that not only did the Government have to prove acts in furtherance of the conspiracy but also that it was necessary for the jury to find that those acts amounted to an unreasonable restraint on interstate commerce. That is exactly the sub-

stance of the Court's instructions in the *GM* criminal case (pp. 13-14, *ante*)[1]. There is therefore no substantial difference between the instruction there and in the *Local 167* case.

Finally Respondents admit that those defendants in the *Local 167* case who had been defendants in the prior criminal case were estopped from denying the conspiracy. (Resp. Bf., p. 25) They assert, however, that the means and methods were of importance only with respect to defendants' conduct following their conviction. (Resp. Bf., p. 25). This last statement is obviously an attempt to obfuscate the question before this Court. What means and methods the defendants there pursued after their conviction is completely immaterial. We are only concerned with whether or not those defendants were estopped to deny the means and methods that they had pursued up to the date of their convictions. Our prior discussion of this matter makes it clear that they were (Pet'r. Bf., pp. 24-27).

In the light of the above, it appears that there is no distinction between the *Local 167* case and the one at bar, and therefore, applying the rule there announced, the GM criminal judgment established that Respondents were guilty of the conspiracy including all the means and methods by which it was carried out.

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[1] Respondents stand in solitary magnificence in their view that the allegations of paragraphs 36 to 62 (R. 21-25) are terms. Two Courts have interpreted those paragraphs. Judge Slick, in ruling on a demurrer to the indictment interposed by Respondents, described those paragraphs as reciting "the means used and acts and things done". U.S. v. G.M.Corp., (D.C., N.D., Ind) 26 F. Supp. 353, 355. The Court below on the criminal appeal stated that "the specific conduct embraced within the illegal concert of action is described in paragraphs 36 to 67". U.S. v. G.M., (C.A.7) 121 F. (2d) 376, 383.

C. On Principles of Res Judicata Petitioners Are Entitled To Reply Upon The Law As Held In The Criminal Appeal.

Estoppel extends not only to facts but also to the law as applied in the prior case even though it is afterwards determined that the law was erroneously adjudicated as applied. *Deposit Bank* v. *Frankfort*, 191 U. S. 499; *Mitchell* v. *First Nat. Bank*, 180 U. S. 471. The Court below has violated this rule of *res judicata* as to two matters of law established by it on the criminal appeal.

(a) In the GM criminal case, the Government to establish the conspiracy and its effectuation through the commission of acts introduced the testimony of 48 dealers who testified as to the coercions imposed upon them by Respondents because of their refusal to use GMAC. Respondents offered to prove through the testimony of the 15,000 other GM dealers that they had not been coerced to use GMAC. The trial Court excluded this testimony and the Court below on the criminal appeal held such exclusion was proper on the grounds that such testimony could not "disprove the affirmative evidence that (Respondents) had restrained the trade of many dealers" and that such "testimony was purely negative in character" (121 F. (2d) 405).

In the instant case, Petitioners to establish the existence of the conspiracy, in addition to the judgment, introduced in evidence the testimony of 16 former GM dealers, most of whom had testified for the Government. These dealers in substance repeated their testimony given in the GM criminal case. As in the GM criminal case, Respondents offered the testimony of numerous dealers that they had not been coerced to use GMAC (R. 8990-9003; 9005-9007). The trial Court, in reliance on the opinion of the Court below in the criminal appeal, ex-

cluded such testimony as negative evidence (R. 4359-4362; 6570-6573). The Court below, contrary to its holding in the criminal appeal, declared that the propriety of the exclusion of such negative testimony generally was a "borderline case", and disapproved of the ruling in the instant case because there the jury could infer the impact of the conspiracy upon Emich Motors from the testimony of the 16 dealers (R. 9467).

The Court below ignored both the elementary proposition that a jury may properly draw inferences from testimony in the record, and the principle of *Lisenba* v. *California*, 314 U. S. 219, discussed at p. 15, *ante*.

(b) In the GM criminal case, the Respondents to justify their conduct offered evidence relating to the rates and practices of other finance companies for the purpose of showing GMAC's rates were lower, their finance practices better, and that they had the public interest at heart in seeking to protect the public from uncontrolled financing. In that case, in connection with Emich, Respondents insisted that Emich and other dealers were privileged to use other finance companies only if they were "as good as GMAC" (Cr. Rec. 319). The trial Court excluded such evidence as to comparative finance rates and practices on the ground of irrelevancy, and the Court below in the criminal appeal approved such exclusion on the ground that the alleged "benevolent motives" of Respondents did not justify their restraints of trade. 121 F. (2d) at pp. 406, 407.

The Court below further held in the criminal appeal that financing bore "no reasonable relation to manufacturer's goodwill and that goodwill can be protected in many ways without coercion of the dealers". 121 F. (2) at p. 403.

In reliance on these holdings in the criminal appeal, the trial Court excluded Respondents' offer (R. 8691-8694) to show that the alleged finance rates of Emich were higher than those of GMAC and other finance companies. Petitioners had objected to the offer as to comparative rates on the further grounds that Respondents did not represent they knew such matters prior to the cancellations and therefore it could not have affected their frame of mind, *May* v. *U. S.*, (App. D. C.), 175 F. (2d) 994, 1009; and that the offer was false, the Respondents having understated the finance rates of other companies as shown by their own admissions in the record, and overstated the finance rates used by Emich by including standard insurance premiums as part of the alleged finance rates (R. 9007-9010). The trial Court had expressly ruled that Respondents could offer evidence as to any alleged fraudulent finance practices (R. 6456) but Respondents offered virtually no such evidence.

The Court below in the case at bar, contrary to its holding in the criminal appeal, held that Respondents could regulate the financing of Emich Motors and that financing did bear a relationship to Respondents' goodwill (R. 9464). It is thus evident that the Court below in the instant case, reversed its holdings in the criminal appeal, despite its pains to declare "that our ruling in this case is in no way to be understood as a retreat from our decision in the criminal case" (R. 9469).

Be that as it may, under the doctrine of *res judicata* the law with respect to the proper exclusion of negative dealer testimony and comparative finance practices was established in the criminal appeal, and even if erroneous, Petitioners were entitled to the benefit of such holdings.

III.

The Identity of the Conspiracy in the Criminal Case and in the Case at Bar was a disputed Issue. In resolving this Issue, the Jury was entitled to have the Indictment.

Respondents' contention (Resp. Bf., p. 29) that the indictment should not have been admitted rests on the erroneous premise that there was no question of fact for the jury concerning the prior case (Resp. Bf., pp. 16-17). The truth is that there were strenuously litigated issues of fact as to whether the charges, issues, witnesses, evidence and conspiracies were the same in the two cases which *Respondents themselves* posed to the jury as major questions it must decide (R. 302, 304, 7210, 7211). Thus, for them to say that the trial judge retains his functions of instructing the jury as to the conviction and its use as evidence (Resp. Bf., p. 29) stops short of reaching the question of how the jury is to be given a rational basis, under Section 5, for exercising its functions in determining these issues of fact. Respondents do not face up to the fact of overriding significance, that because Section 5 makes the prior conviction merely *prima facie* evidence, the jury must decide these factual issues no less than any other (Pet'r. Bf., p. 38).

The authorities cited by Respondents (Resp. Bf., p. 29) as supporting their proposition that the effect of a judgment is a question of law for the Court are actually in our favor. Thus Black (Vol. 2, 2nd Ed., Par. 631) states that "the identity of the present with the former action is a question of fact for the jury, to be determined by them upon the evidence adduced". He observed that it is only when that question is determinable from *the pleadings* or where there is no question in the second trial as to the identity of the matter in controversy that the matter is one for the Court.

In the instant case, the identity of the causes of action was made an issue (R. 8, 9, 32) and hence, according to Black, that became a question for the jury.

The citation from Freeman on Judgments, Vol. 2, Sec. 767, is not in point as it does not deal with the question of identity.

Respondents assert (Resp. Bf., p. 31) that *Hornbuckle* v. *Stafford,* 111 U. S. 389, 391, 393, is not in point since it was an equitable action. They stated that case merely "announced the basic proposition that • • • a record may be examined by the court" and not by the jury in ascertaining what matters were determined by a prior judgment. This is just not true. While the *Hornbuckle* case was an equitable action, the issues of fact were tried before a jury. The plaintiff introduced a decree in a prior action to establish estoppel. An offer of the complaint and answer in the prior suit to explain the decree was rejected by the trial Court. There was no evidence *dehors* the record to explain the prior action. This Court held that the complaint and answer in the prior suit should properly have been admitted in evidence.

IV.

There Being No Requirement of Mutuality of Parties and The Causes of Action Being the Same, The Criminal Judgment Established the Cancellation of Emich Motors' Franchises under Rules of Res Judicata. Even if the Causes of Action were Different, The Same Result Would Follow.

Respondents question whether our discussion under Point IV (Pet'r. Bf., pp. 43-48) is within the grant of *certiorari.* It seems quite obvious to us that it is. The grant was limited to questions having to do with the use that may be made under Section 5 of a prior Government

indictment and judgment. Since Section 5 deals with the law of *res judicata,* any discussion relative to the use of a judgment as an estoppel is pertinent. This is particularly so since Section 5 will be outmoded should this Court accept our views. Thus, it is quite necessary in determining the scope of Section 5 for this Court to consider whether or not such scope unduly limits litigants in contravention of rules of substantial justice.

The fact that our argument on the point has not been advanced before does not prevent its assertion now in support of the judgment. *Helvering* v. *Gowran,* 302 U. S. 238, 245-246.

Respondents argue (Resp. Bf., pp. 32-33) that application of the principles of *res judicata* cannot here be had because (a) the causes of action are not identical, and (b) the parties are not the same.

That there is no real necessity for mutuality of parties in cases where the person against whom the doctrine of *res judicata* is invoked has had his day in court has already been argued by us (Pet'r. Bf., pp. 43-48).

The question as to whether the causes of action are the same is not important. If they are the same, then Respondents are barred from asserting any defense to matters offered and received in the criminal case in support of the Government's action which would include, of course, the cancellation of Emich Motors' franchises. If the causes of action are not the same, Respondents would be estopped to deny what was litigated and determined in the prior suit which included those cancellations (Pet'r. Bf., pp. 27-37; pp. 9-18, *ante*).

It seems clear, however, that the causes of action are the same since they are both based on the same wrong, *i.e.,* the conspiracy to restrain trade, *Baltimore S. S. Co.* v. *Phillips,* 274 U. S. 316, 321, and the evidence in the in-

stant case would have sustained the issues in the Government case. *U. S.* v. *Haitian Republic,* 154 U. S. 118, 125; Restatement of the Law of Judgments, Par. 61, pp. 240-241. These authorities were cited by us before (Pet'r. Bf., p. 22) and have elicited no argument from Respondents. In any event, it is apparent that under the application of either rule of *res judicata,* Respondents cannot deny the cancellations of the franchises pursuant to the conspiracy.

CONCLUSION.

We respectfully submit that Respondents have advanced no sound reason why the judgment of conviction should not be held to be conclusive evidence under principles of *res judicata,* or in the alternative, *prima facie* evidence under Section 5 of the Clayton Act, that Respondents pursuant to the conspiracy cancelled dealers, including Emich Motors, for failure to use GMAC.

Respectfully submitted,

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